IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEE EPLER and JULIEANN EPLER, h/w, Plaintiffs, v. JANSPORT, INC. subsidiary of VF CORPORATION, EL CID, and MACKENZIE MERCHANDISING, INC., Defendants.	:	CIVIL ACTION NO. 00-CV-154

MEMORANDUM

ROBERT F. KELLY, J. FEBRUARY 22, 2001

Presently before this Court is the Motion for a Ruling that the Ranier Jacket is not Unreasonably Dangerous as a Matter of Law, or, Alternatively, for an Evidentiary Hearing on the Issue, and for Summary Judgment on Plaintiffs' Negligence and Breach of Warranty Claims (Dkt. No. 27) filed by Defendants Jansport, Inc. and Mackenzie Merchandising, Inc. ("Jansport" and "Mackenzie" or "Defendants"). Plaintiffs Lee Epler and Julieann Epler, husband and wife, ("Mr. Epler" and "Mrs. Epler" or "Plaintiffs") instituted this products liability action against Jansport, Mackenzie and El Cid[1] for injuries sustained by Mr. Epler on December 18, 1998. Plaintiffs claim that design defects in Jansport's Ranier jacket, manufactured by El Cid, marketed to

[1] Defendant, El Cid, has failed to enter an appearance or respond to the pleadings filed by the parties in this matter.

Jansport through Mackenzie, and distributed by Jansport, caused injury to Mr. Epler. For the following reasons, the Motion is granted.

I. BACKGROUND

On December 18, 1998, Mr. Epler put on the Ranier jacket, which he had worn five or six times previously, and went outside to walk his dog and mail a letter. While outside, the wind suddenly picked up and it began to snow, resulting in a small squall. Mr. Epler turned his back to the wind and then zipped up the jacket. Mr. Epler then bent down and flipped up the hood of the jacket while at the same time grabbing the hood's draw cords.[2] The draw cord slipped out of Mr. Epler's hand and recoiled towards his face. As a result, the plastic cord lock at the end of the cord struck Mr. Epler in his left eye causing injury.

Plaintiffs filed this lawsuit against Jansport on January 11, 2000 claiming strict liability, negligence and breach of warranties. Plaintiffs later amended the Complaint to include Mackenzie and El Cid as Defendants. On November 13, 2000, Jansport and Mackenzie filed the instant Motion.

II. STANDARD OF REVIEW

Pursuant to Rule 56(c) of the Federal Rules of Civil

[2] The draw cords consist of an elasticized cord running through the hood with plastic cord locks at the ends of the cord.

Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

Under Pennsylvania law, in a strict liability action,

the court must decide as a threshold matter, "whether the evidence is sufficient, for purposes of the threshold risk-utility analysis, to conclude as a matter of law that the product was not unreasonably dangerous, not whether the evidence creates a genuine issue of fact for the jury." Surace v. Caterpillar, Inc., 111 F.3d 1039, 1049 n.10 (3d Cir. 1997)(clarifying Azzarello v. Black Brothers, Inc., 391 A.2d 1020 (Pa. 1978)). The burden of establishing that the product is not unreasonably dangerous through the risk/utility analysis lies with the defendants, and the evidence on this threshold issue must be viewed in the light most favorable to the plaintiff. Riley v. Becton Dickinson Vascular Access, Inc., 913 F. Supp. 879, 884 (E.D. Pa. 1995).

III. DISCUSSION

A. Strict Liability

When this Court has diversity jurisdiction over a case, it must apply the substantive law of Pennsylvania under the Erie doctrine. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Pennsylvania Supreme Court has adopted the Restatement (Second) of Torts section 402(A). Webb. v. Zern, 220 A.2d 853 (Pa. 1966). This section makes a seller of products “strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user.” Jordon by Jordan v. K-Mart Corp., 611 A.2d 1328, 1330 (Pa. Super. 1992) (citing Berkebile v.

Brantly Helicopter Corp., 337 A.2d 893, 899 (Pa. 1975)).

Section 402(A) requires the plaintiff to prove that: (1) the product was defective; (2) the defect existed when it left the hands of the manufacturer; and (3) the defect caused the harm. Ellis v. Chicago Bridge & Iron Co., 545 A.2d 906, 909 (Pa. Super. 1988)(citing Berkebile, 337 A.2d at 898). Courts applying Pennsylvania law in strict liability cases must "determine, initially and as a matter of law, whether the product in question is 'unreasonably dangerous.'" Riley, 913 F. Supp. at 881; Azzarello, 391 A.2d 1020. If the court finds that the product is not in a defective condition, unreasonably dangerous, then the court will dismiss the plaintiff's strict liability claim in the same manner as in a typical summary judgment determination. Surace, 111 F.3d 1039 at 1049 n.10.

Under Pennsylvania law, when deciding whether strict liability applies because a product is or is not in a defective condition, unreasonably dangerous, the court must weigh the following seven factors of a risk/utility analysis: (1) the usefulness and desirability of the product - its utility to the user and the public as a whole; (2) the safety aspects of a product - the likelihood that it will cause injury and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe

character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. Surace, 111 F.3d at 1046 (citing Dambacher by Dambacher v. Mallis, 485 A.2d 408, 423 n.5 (Pa. Super. 1984)); Van Buskirk v. West Bend Co., 100 F. Supp. 2d 281, 285 (E.D. Pa. 1999); and John W. Wade, On the Nature of Strict Tort Liab. for Prods., 44 Miss. L.J. 825, 837-38 (1973)). An examination of each risk/utility factor follows.

1. The Usefulness and Desirability of the Product - Its Utility to the User and to the Public.

Defendants claim that the usefulness and desirability of a jacket with an adjustable hood for keeping the elements at bay is self-evident. Plaintiffs do not dispute the utility of a jacket such as the Ranier jacket. However, Plaintiffs claim, without support, that the relevant inquiry does not concern the usefulness and desirability of the jacket as a whole, but only concerns the usefulness and desirability of the elasticized draw

cord and cord locks. This Court has been unable to find any case law that supports Plaintiffs' position. Rather, the case law found by this Court implies that this first risk/utility analysis factor concerns the utility of the product as a whole, not simply the utility of one particular piece of the product. See Van Buskirk, 100 F. Supp. 2d at 286 (focusing the analysis of the first factor on the utility of a four cup deep fryer as a whole and not on the allegedly defective parts of the fryer); Monahan v. Toro Co., 856 F. Supp. 955, 958 (E.D. Pa., 1994)(stating that riding lawn tractors are useful and desirable). Thus, we agree with the Defendants that a jacket with an adjustable hood, such as Jansport's Ranier jacket, is useful, desirable, and has great utility to the user and to the public as a whole.

2. The Safety Aspects of a Product - The Likelihood that It Will Cause Injury and the Probable Seriousness of the Injury.

Defendants allege that the jacket does not pose any unusual risk of injury. Jansport claims that it has sold and marketed approximately 78,333 units of outwear since 1997 that included an elasticized draw cord and cord locks similar to those incorporated in the Ranier Jacket. This represents 43.3% of the total outerwear sold and marketed by Jansport since 1997. Furthermore, Jansport alleges that, other than this present action, it has not been notified of any other problems, accidents, or injuries in connection with any of these units of

outerwear utilizing the elasticized draw cord and cord locks. Plaintiffs have also not produced any evidence of other injuries occurring with the Ranier jacket. One accident arising from one unit out of 78,333 units shows a low likelihood of injury. Simply because "some injuries may occur does not mean that a [product] is defective." Monahan, 856 F. Supp. At 959. In the absence of any evidence of other injuries, this factor weighs in favor of Defendants. See Van Buskirk, 100 F. Supp. 2d at 286; Riley v. Warren Mfg., 688 A.2d 221, 225-226 (Pa. Super 1997).

Plaintiffs attempt to distinguish Van Buskirk and Warren Mfg. on the basis that they involved unintended users of the product while in the present action, Mr. Epler was an intended user. However, this distinction has no bearing on whether evidence showing a lack of prior accidents may be used in analyzing this factor of the risk/utility analysis. Furthermore, cases such as Spino v. John S. Tilley Ladder Co., 696 A.2d 1169 (Pa. 1997) and the cases cited therein, cited by the Plaintiffs for the proposition that evidence showing a lack of prior accidents may not be considered by the fact finder, concern the admission of evidence at trial and not during the preliminary risk/utility analysis performed by the court.

3. The Availability of a Substitute Product Which Would Meet the Same Need and Not Be as Unsafe.

Plaintiffs' expert, Christopher M. Pastore, Ph.D., a materials engineer ("Dr. Pastore"), proffers five alternative hood closure designs which he believes would make the Ranier jacket safer than its current configuration utilizing the elasticized cord and cord locks.[3] There is no evidence that Dr. Pastore has tested these alternative designs. Dr. Pastore does, however, rely in part upon the Consumer Products Safety Commission's report on the use of draw cords on children's clothing and the risk of strangulation. The Court notes this report is not directly applicable as the Ranier jacket is designed for adults and Plaintiffs have not alleged a strangulation injury.

However, Defendants have not shown that a jacket utilizing an elasticized cord and cord locks with the loose cord ends sewn into the garment would not be an adequate substitute product that would be "safer overall" and would reduce the risk of recoil. See Riley, 913 F. Supp. at 886. Furthermore,

[3] Dr. Pastore suggests the use of a non-elastic cord, sewing elastomeric tape around the hood opening, or using interior flaps held shut by buttons or Velcro©. However, these designs do not appear to meet the same need as the current Ranier jacket design (see section III. A. 4., infra). Dr. Pastore also suggests using a cord and cord lock located at the back of the hood, or using an elasticized cord and cord locks, like the one at issue, but sewing the loose ends of the cord within the garment to prevent recoil.

Plaintiffs have shown the availability of this alternative product by producing similar jackets from other manufacturers which utilize an elasticized draw cord and cord locks with the loose cord ends sewn into the jacket. Therefore, this factor weighs in favor of the Plaintiffs because it is possible that at least one of Plaintiffs' alternative designs would meet the same need at the Ranier jacket and not be as unsafe.

4. The Manufacturer's Ability to Eliminate the Unsafe Character of the Product Without Impairing Its Usefulness or Making It Too Expensive to Maintain Its Utility.

Plaintiffs also claim that the five alternative hood closure designs would not impair the usefulness of the jacket or make it too expensive to maintain its utility. Of these alternative designs, Defendants claim that the braided non-elastic cord, the elastomeric tape sewn within the hood and the interior flaps held in place by buttons or Velcro© would not allow for the same visibility and freedom of movement as the Ranier jacket currently allows. Further, Defendants claim that a cord and cord lock on the back of the hood would also be unacceptable because the wearer would not be able to see the cord while adjusting the hood and the design could not be utilized by an individual lacking full motion in their shoulders. Defendants allege that these designs would impair the usefulness of the jacket and would create their own safety hazards due to the

reduced visibility they would cause.

However, Defendants do not comment upon the use of an elasticized cord and cord locks with the loose cord ends sewn into the garment. Defendants have not shown that this design would not function almost identically to the current design of the Ranier jacket and would not reduce the risk of recoil. Defendants further point out that Dr. Pastore does not offer proof that the alternative designs would not render the Ranier jacket too expensive to maintain its utility. However, while viewing the facts in a light most favorable to the Plaintiffs, it is unlikely that the implementation of this alternative design would render the jacket too expensive to maintain its utility. Therefore, this factor weighs in favor of the Plaintiffs.

5. The User's Ability to Avoid Danger by the Exercise of Care in the Use of the Product.

The Court must decide if Mr. Epler acted as an "ordinary" consumer in using care to avoid dangers associated with elasticized cords. Van Buskirk, 100 F. Supp. 2d at 288 (citing Berkebile, 337 A.2d at 899 n.6). The "user" referred to in the risk/utility analysis factors is the ordinary consumer who purchases or uses the product. Surace, 111 F.3d at 1051. A user could avoid the dangers associated with the elasticized cord and cord locks by being mindful of the propensity of elastic cords to recoil and by exercising care by not pulling forcefully on such a

cord in the vicinity of the user's face. Such care could reasonably be exercised even in adverse weather conditions. Therefore, this factor weighs in favor of the Defendants.

6. The User's Anticipated Awareness of the Dangers Inherent in the Product and Their Avoidability, because of General Public Knowledge of the Obvious Condition of the Product, or of the Existence of Suitable Warnings or Instructions.

This Court assumes that the average ordinary consumer is well acquainted with the propensity of all manner of elastic items to recoil after they have been extended and released. In fact, in Dr. Pastore's report, he acknowledges that the danger associated with the recoil energies of an elasticized cord "is known from basic physics as well as common experience from ordinary exposure to the behavior of elastomeric materials such as rubber bands, bungee cords or any type of elastomeric cord." Pls.' Resp., Ex. D, p. 2. Furthermore, because of the obviousness of the danger of recoil, a warning to that effect is not required. Ellis, 545 A.2d at 914. Because the recoil danger is well known by the public, the user would be aware of the danger and how to avoid that danger.

7. The Feasibility, on the Part of the Manufacturer, of Spreading the Loss by Setting the Price of the Product or Carrying Liability Insurance.

Our district court cases have stated that while a manufacturer or supplier is usually able to spread the cost of a

plaintiff's loss to all consumers of a product by raising the price of the product, the feasibility of doing so depends upon balancing the remaining factors in the risk/utility analysis. Riley, 913 F. Supp. at 890 (citing Monahan, 856 F. Supp. 955); Van Buskirk, 100 F. Supp. 2d at 289. If after examining the first six factors, the utility of the product outweighs its risks, then shifting the cost of the plaintiff's loss to the defendant is not fair, and therefore, not feasible. Id. This Court has concluded that four of the six previous risk/utility factors favor the Defendants. Therefore, since these factors show that the Ranier jacket is not unreasonably dangerous, the defendants "'should not have to spread among [their] customers the economic loss resulting from injuries from a product that is not defective.'" Van Buskirk, 100 F. Supp. 2d at 289 (quoting Monahan, 856 F. Supp. at 964).

After weighing these seven factors, this Court finds that the Ranier jacket is not in a defective condition, unreasonably dangerous. Therefore, since the Plaintiffs have not crossed this threshold, the strict liability claim will not move forward.

B. Negligence

Plaintiffs allege that Defendants owed them a duty to exercise reasonable care and not to create a product which involved an unreasonable risk of physical harm. Plaintiffs

further claim that Defendants breached this duty by failing to perform safety tests on the Ranier jacket and by releasing a product that involved an unreasonable risk of injury without an adequate warning. To succeed on a claim of negligence under Pennsylvania law, a plaintiff must establish: (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the required standard; (3) a causal connection between the conduct and the resulting injury; and (4) a resulting actual loss or damage. Monahan, 856 F. Supp. at 965 (citing Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366 (3d Cir. 1993)).

The duty analysis in a negligence claim depends on whether a reasonable person should have foreseen the likelihood of harm to the plaintiff resulting from the defendant's conduct. Id. (citing Griggs v. BIC Corp., 981 F.2d 1429, 1435 (3rd Cir. 1992)). If the risks inherent in a defendant's conduct were foreseeable, the court must analyze whether the foreseeable risks were unreasonable. Id. Since the Pennsylvania Supreme Court has not set forth a standard for the courts to follow in this area, the Third Circuit has opined that Pennsylvania courts would utilize a risk/utility analysis in determining whether the foreseeable risks were unreasonable. Id. (citing Griggs, 981 F.2d at 1435-36). This risk/utility analysis balances "the risk, in light of the social value of the interest threatened, and the

probability and extent of the harm, against the value of the interest which the actor is seeking to protect." Griggs, 981 F.2d at 1436. The Griggs court explained this analysis by stating that:

> No person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded . . . . On the other hand, if the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone . . . . As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.

Griggs, 981 F.2d at 1436 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts §§ 31, at 170-71 (5th ed. 1984)).

When looking at the facts in the light most favorable to the Plaintiffs, it is possible that the risk of eye injury from the elasticized draw cord and cord locks of the Ranier jacket was foreseeable. However, even if the risk of such an injury was foreseeable, the risk was not unreasonable under a risk/utility analysis of the Ranier jacket. First, the probability and extent of harm from the Ranier jacket was very low. According to Defendants, this accident is unique and Plaintiffs have offered no evidence of any other accidents involving the Ranier jacket. Second, Defendants claim that the

fully adjustable hood of the Ranier jacket provides superior visibility and freedom of movement which would be sacrificed if alternative hood closure methods were to be adopted. Even though one of the alternative hood closure methods offered by Dr. Pastore may be an adequate substitute (see section III. A. 4., supra), this court agrees with the Defendants, that under a risk/utility analysis, the utility of the Ranier jacket design outweighs the extremely low risk of injury. Therefore the risk posed by the jacket design was not unreasonable.

Lastly, a defective condition also includes the lack of adequate warnings for a product's safe use. Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 119 (3rd Cir. 1992); Berkebile, 337 A.2d at 902. However, a defendant can be negligent for failure to warn of a danger only if that danger is not obvious. Id. As discussed above, the risks inherent in an elasticized cord are obvious and are assumed to be known by the general public (see section III. A. 6., supra). Therefore, because the risk of recoil was obvious, there was no negligence by the Defendants for failure to warn purchasers that the cord had elastic properties which could cause it to recoil if stretched and released. Because Plaintiffs have not shown that Defendants breached a duty owed to them, the final negligence factors need not be examined and summary judgment on the negligence claim is appropriate.

C. Breach of Implied Warranties[4]

"Both the implied warranty of merchantability and the warranty of fitness for a particular purpose arise by operation of law and serve to protect buyers from loss where the goods purchased are below commercial standards or are unfit for the buyer's purpose." Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992). Under the warranty of merchantability, goods must be "fit for the ordinary purposes for which such goods are used." 13 Pa.C.S.A. § 2314(b)(3). However, the warranty of fitness for a particular purpose requires that the seller had reason to know, at the time of contracting, "any particular purpose for which the goods [were] required" and "that the buyer [relied] on the skill or judgment of the seller to select or furnish suitable goods." 13 Pa.C.S.A. § 2315. In that case, an implied warranty arises that the goods are fit for the particular purpose. Id. To establish a breach of either implied warranty, plaintiffs must show that the item purchased from the defendant was defective. Altrontics, 957 F.2d at 1105.

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[4] Plaintiffs' complaint states that Defendants "expressly represented or in some other manner expressed warranties that the outerwear hooded jacket and its component parts were safe for use for the purposes intended and were of merchantable quality." Compl., ¶ 29; Am. Compl., ¶ 27. However, Plaintiffs have provided no evidence whatsoever regarding an express warranty and have not addressed express warranties in their Response to Defendants' present Motion. Therefore, this Court finds that Plaintiffs have abandoned this ground for relief. See Monohan, 856 F. Supp. at 966.

This Court has found, both under a strict liability analysis and under a negligence analysis, that the Ranier jacket is not defective. In the absence of a defect, Plaintiffs claim for breach of implied warranties fails. Furthermore, the Ranier jacket and the elasticized cord hood closure are fit for the ordinary purposes for which they are used: the jacket protected its wearer from the elements and the cords properly allowed for adjustments of the hood. Although there are alternative styles of hood closures, this style comprising an elasticized cord and cord locks is commonly used and accepted. Also, no evidence has been presented that Plaintiffs told any representatives of Defendants any particular purpose for which the jacket was to be used or that any representatives knew that Plaintiffs were relying on their skill and judgment in choosing the jacket. Therefore, summary judgment is appropriate for Plaintiffs' breach of implied warranty claims.

IV. CONCLUSION

This Court finds that the Ranier jacket is not unreasonably dangerous. This Court also concludes that there is no genuine issue of material fact presented in Plaintiffs' claims for negligence and breach of implied warranty. Therefore, this Court grants Defendants' motion in full.

An appropriate order follows.

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LEE EPLER and JULIEANN EPLER, h/w, Plaintiffs, v. JANSPORT, INC. subsidiary of VF CORPORATION, EL CID, and MACKENZIE MERCHANDISING, INC., Defendants.	CIVIL ACTION NO. 00-CV-154

ORDER

AND NOW, this 22nd day of February, 2001, upon consideration of the Joint Motion for a Ruling that the Ranier Jacket is not Unreasonably Dangerous as a Matter of Law, or, Alternatively, for an Evidentiary Hearing on the Issue, and for Summary Judgment on Plaintiffs' Negligence and Breach of Warranty Claims filed by Defendants Jansport, Inc. and Mackenzie Merchandising, Inc. (Dkt. No. 27) and Plaintiffs' Response thereto, it is hereby ORDERED that:

(1) the Rainier jacket is not unreasonably dangerous as a matter of law and Plaintiffs' strict liability claims against Defendants Jansport, Inc. and Mackenzie Merchandising, Inc. are DISMISSED with prejudice; and

(2) the Joint Motion for Summary Judgment filed by Defendants Jansport, Inc. and Mackenzie Merchandising, Inc. on Plaintiffs' negligence and breach of warranty claims is GRANTED.

BY THE COURT:

ROBERT F. KELLY, J.